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Supreme Court, U.S.
FILED
OCT 9 - 2007
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(1)

NO. 07-709

IN THE

SUPREME COURT OF THE UNITED STATES

GUADALUPE LOPEZ
PETITIONER

VS.

SECRETARY, DEPARTMENT OF HUD
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

GUADALUPE F. LOPEZ
9821 CAMINO VILLA #1823
SAN ANTONIO, TX. 78254
210-682-2247 [HM. & FAX#]

QUESTION(S) PRESENTED

1. Is the Fifth Circuit Court of Appeals permitted to enter a decision conflicting with prior Supreme Court of the United States decisions defining an acceptable prima facie case, due to appellate court workload caused by Hurricane Katrina?

2. Is the Fifth Circuit Court of Appeals permitted to decide an important federal question in contradiction with Supreme Court definition of a "prima facie case," due to appellate court knowledge of a 1% percent statistic that Petitioners Writ of Certiorari will be granted?

3. Is the Fifth Circuit Court of Appeals permitted to decide an important federal question ignoring other Appellate Courts similar case decisions which conclude that element of a "prima facie case" can be substituted in RIF case(s) or similar, Temporary positions?

4. Is the Fifth Circuit Court of Appeals permitted to depart from the accepted and usual course of judicial proceedings by ignoring to acknowledge in Appellate Court decision opposing party legal and argumentative facts supporting a "prima facie case" which cited supporting Supeme Court and other Appellate Court decisions?

5. Is the Fifth Circuit Court of Appeals permitted to decide an important federal question in a way that

conflicts with a decision of the Supreme Court and other Appellate Courts concerning other acceptable fourth elements establishing a prima facie case?

6. Is the Fifth Circuit Court of Appeals permitted to decide an important federal question ignoring evidence which establish governmental agency favorable race employment practices.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[X] For cases from Federal Courts:

The opinion of the United States court of appeals appears at Appendix B to the petition and is [X] unpublished.

JURISDICTION

[X] For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was July 9, 2007.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 14, 2007, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 USC section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supreme Court has complete discretion to hear cases to it by writ of certiorari from Federal Courts of Appeals involving a genuine controversy where...Fifth Circuit Court of Appeals afforded greated weight to State definition of a Prima Facie Case over Supreme Court decision which stated that the prima facie proof required from (plaintiff) is not necessarily applicable in every respect to different factual situations. ***McDonnell Douglas Corp. v. Green***, 411, U.S. 792, 802 (1973).

Fifth Circuit Court decision denied Petitioner Procedural Due Process and Equal Protection under the law permitting model employer Federal Government to deprive Petitioner right to engage in gainful employment.

STATEMENT OF THE CASE

Petitioner (Guadalupe Lopez, Jr.) respectfully prays that a Writ of Centiorari issue to review judgement from Fifth Circuit Court of Appeals August 14, 2007 decision denying Petitioner petition for rehearing which demonstrated that Fifth Circuit Court entered a decision in conflict with prior decisions of the Supreme Court and other Appellate Court decisions on the same important matter, decided an important federal question in a way that conflicts with a decision issued by the Supreme Court and other Appellate Courts, and departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power denying Petitioner his constitutional rights to equal protection under the law and procedural due process.

1. Fifth Circuit Court Decision departed from the accepted and usual course of judicial proceedings excluding from its decision Petitioner findings of fact supporting a prima facie case, ignored Petitioner listed

conclusions of law contradicting District Court Judgement conflicting with Supreme Court decision (1) and a majority of other Appellate Court decision(s) defining other forms of evidentiary facts establishing a prima facie case.

In addition, Fifth Circuit Court Decision departed from the accepted and usual course of judicial proceedings by wrongly concluding that Petitioner appeal involved: "failure to promote him because of his age, his national origin, and as a result of retaliation. He was also subject to a hostile enviroment," where [Appendix C] verify Fifth Circuit Court misinterpretation of District Court Judgement against Petitioner did not involve failure to promote.

2. Fifth Circuit Court Decision was not impartial as to call for an exercise of this Court supervisory power, where Fifth Circuit Court articulated decision referenced

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(1) Supreme Court in Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) defined acceptable fourth element of a prima facie case as, "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

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Petitioners non-attorney status [Appendix B pg.2] and Decision ignored or refused to identify evidence provided by Petitioner in opposition to District Court erroneous decision which favored Defendant-Appellee 50(a) Motion for Judgement.

3. Fifth Circuit Court Decision was not impartial an entered a decision in conflict with prior decision of the Supreme Court (2) and other Appellate Court decisions on the same important matter, decided an important federal question in a way that conflicts with a decision issued by the Supreme Court and other Appellate Courts, and departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of

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(2) Supreme Court decision in ***Connecticut v. Teal***, 45 U.S. 440, (1982) concluded that defendant cannot rely on defense that (protected group) were selected or terminated at equal percentage rate than African American or Whites at the "bottom line" is not a defense to a claim of discrimination. The Court concluded that allowing such a defense would permit employers to discriminate against some employees on the basis of sex or race merely because they treated other members of the employee's group favorably. ***Id.***

this Court's supervisory power where Fifth Circuit Court Decision misleadingly stated:

"He alleges he was not selected for a permanent federal position, because he is Hispanic, though he was later selected to fill that position on a temporary basis,"[Appx. B pg.2] is contradicted by the following evidentiary facts:

[Appx. D - Records excerpt 12 pgs.4 thru 11] Defendant-Appellee [trial exhibit 20,21,& 22] verify that in 1991 (none of five) HUD qualified Hispanic applicants including Petitioner referred to (BM) John Eubanks for (one of three) advertised EOS positions were hired for any permanent positions given to lesser qualified (WM) Gary Lacefield, (BM) Rayford Johnson, (BF) Sheila Qualls [applications not provided at trial verifying qualifications or positions applied for by selected non-hispanic hires]; and in 1993 (two years later) [Appx. E - Record Excerpt 11 pgs.3-4] after initially being again rejected(3)

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(3) ***Teamsters v. United States***, 431 U.S. 324, 335-36 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment").

over lesser qualified non-hispanic hires over better qualified hispanic Petitioner, OPM had to order HUD selecting official (BM) John Eubanks to hire Petitioner under OPM Displaced Federal Employee Program authority to (one of five) advertised "temporary Equal Opportunity Specialist" position verified by the following affidavits.

See, Affidavit of (BM) John Eubanks (HUD selecting official) [Appx. F - trial exhibit 3] verify that HUD selecting official Mr. Eubanks contested Petitioners hiring.

4. Fifth Circuit Court decision again entered a decision in conflict with prior decisions of the Supreme Court and other Appellate Court decisions on the same important matter, decided an important federal question in a way that conflicts with a decision issued by the Supreme Court and other Appellate Courts where Fifth Circuit Court concluded:

"He has failed to prove that the positions were provided to members outside of his protected class. There was evidence that two qualified Hispanics, while not initially

selected in a preliminary round, were eventually offered the positions," [Appx. pg. 3] ....is a misinterpretation of the actual facts supported by affidavits.

Affidavit(s) of HUD selecting official (BM) John Eubanks (Director EO-Compliance) and (BM) John Wright HUD (Director-FHEO) in [Appx. F] and Defendant-Appellee [District Court trial exhibits 1 & 3] verify that HUD selecting official(s) both stated the following:

"I dont know whether any Hispanics were selected for any position there may have been for the same eighteen month period, 6/91 to 12/92."(4)

Affidavits of both HUD Directors responsible for the hiring of personnel into Fair Housing & Equal Opportunity Program which they sought applicants under

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(4) ***Barnes v. Yellow Freight Systems, Inc.,*** 778 F.2d 1096. 1101 (5th Cir.1985) ("When a supervisor of one race treats employees of the same race more favorably than similarly situated employees of another race under circumstances that are essentially identical, a presumption of discriminatory intent is raised.")

advertised Equal Opportunity Specialist positions [supported Petitioner prima facie case], where HUD Directors would have known if they had hired a single Hispanic during the periods [6/91 to 12/92] dates qualified (hispanic) Petitioner was rejected.

5. Fifth Circuit Court decision again entered a decision in conflict with prior decisions of the Supreme Court and other Appellate Court decisions on the same important matter, decided an important federal question in a way that conflicts with a decision issued by the Supreme Court and other Appellate Courts where Fifth Circuit Court concluded:

"Wrongful discharge, he has equally failed to show that he was replaced by someone outside of his protected class," [Appx. pg.3].. is a misinterpretation of the actual facts departing from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power :

Petitioner was a (6 months) temporary hire who's temporary employment (5) had been extended a total of 4 times, and was discharged for alleged conduct unbecoming of an EOS.

See, [Appx. G & G-1] [Trial Ex.12] (WM) Garry Sweeney 10/6/94 statement to EEO Counselor Inquiry stated: "Temps are treated differently."

Substitution of prima facie element [replaced by someone outside of his protected class] is necessary in Temporary position cases similar to RIF cases, because the position is eliminated and replacement is not an issue. ***Berndt v. Kaiser Aluminum & Chem. Sales, Inc. 789 F.2d 253 (3d. Cir. 1986)***

6. Fifth Circuit Court decision again entered a decision in conflict with prior decisions of the

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(5) ***Chescheir v. Liberty Mutual Insurance Co.,*** 713 F.2d 1142, 1149-50 (5th Cir. 1983) ("In contrast to Liberty Mutual's energetic investigation of women it believed might be attending law school, Liberty Mutual never investigated any of these allegations, suspicions, or rumors about male adjustors" attending law school.)

Supreme Court and other Appellate Court decisions on the same important matter, decided an important federal question in a way that conflicts with a decision issued by the Supreme Court and other Appellate Courts concluding:

"He alleges he was terminated from that temporary position in retaliation for filing a EEOC complaint regarding his non-selection for the permanent position," (6&7) [Appx.B pg.2]...is a misinterpretation of the actual facts departing from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

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(6) "District Court erroneously dismissed plaintiff's retaliation claim because termination occurred nearly one year after her protected activity; when there may be reasons why adverse action was not taken immediately, absence of immediacy does not disprove causation." ***See, Kachmar v. Sunguard Data Systems,*** 109 F.3d 173 (3d Cir. 1997)

(7) An inference of retaliation may arise even if the time period between the protected activity and the adverse action was long, if there is other evidence that raises an inference of retaliation. ***Example. in Shirley v. Chrysler First Inc.,*** 970 F.2d 39 (5th Cir.1992).

See, [Appx. H] Joint Pre-Trial Order verify termination was in retaliation for Petitioner filing the following discrimination complaints:

Feburary, 1993 EEO Complaint 93-23 (non-selection) against (BM) John Eubanks and (BM) Director John Wright; July 21, 1993 EEO Complaint 93-35 retaliation (accused of travel voucher fraud, parking government vehicle in wrong area, not performing duties in work area) filed aganist (BM) John Eubanks; September 28, 1993 EEO Complaint 93-48 on (alleged abuse of lunch hour) against (WM) supervisor Garry Sweeney who stated in affidavit "did'nt charge Petitioner for any leave;" October 19, 1994 EEO Complaint 95-05 (wrongful termination based on conduct unbecoming of an EOS due to Petitioner alleged assistance to hispanic housing complaints not assigned to Petitioner case load during complaint intake assignment) filed against (WM) Garry Sweeney, (BM) John Wright FHEO Director.

7. Fifth Circuit Court decision again decided an important federal question in a way that

conflicts with a decision issued by the Supreme Court (8) concluding:

"His hostile working environment claim, the evidence does not support a subjective perception of severe or pervasive harassment that an objectively reasonable person would find as hostile and abusive," [Appx. B pg.3]... is a misinterpretation of the actual facts listed in {Appx. H] Joint Pre-Trial Order verifying "frequency" of discrimination.

8. Finally, Fifth Circuit Court decision again decided an important federal question in a way that conflicts with a decision issued by the Supreme Court and other Appellate Courts, and departed from the accepted and

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(8) Supreme Court Justice Sandra Day O'Conner defined hostile working environment as: " whether an environment was hostile or abusive had to be determined by examining all the circumstances. These might include the frequency of discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with an employee's work performance. Psychological harm could additional be taken into account as a relevant factor, even though proof of such was not required.

usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power (9) where Fifth Circuit Court concluded:

"Retaliation claim, he failed to produce evidence that a causal link existed between the protected activity and the adverse action." "Lopez presented no evidence establishing the supervisors knowledge of his complaints," [Appx B.pg 4]..is a misinterpretation of the actual facts departing from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power as follow:

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(9) The fourth element McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) test and reaffirmed by the Supreme Court in Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) states: "McDonnell Douglas Court itself emphasized, "[t]he facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to different factual situations." 411 U.S. at 802 n.13. Other evidence that may establish a prima facie case under appropriate circumstances is statistical evidence, evidence of actual incidents of discrimination, etc.

See [Appx. I pg.2] supervisor (WM) Garry Sweeney affidavit verified knowledge of EEO complaint : "Neither party provided leave slips. Instead, they contacted EEO Counselor Barbara Bates."'"I had a discussion with Ms. Bates and she relayed to me that Lopez plaintiff and Ms Moreno had told her that they did not leave for lunch until sometime around 12:00pm, when Ms. Moreno completed her time and attendance report."

Fifth Circuit Court prejudiciously entered a decision in conflict with prior decisions of the Supreme Court and other Appellate Court decisions on the same important matter, decided an important federal question in a way that conflicts with a decision issued by the Supreme Court and other Appellate Courts, and departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, where Fifth Circuit Court excluded in its decision Petitioner findings of fact, evidence of record, conclusions of law, articulated reasons and basis for filing suit etc., where Petitioner evidentiary records provided

to the Fifth Circuit Court met Supreme Court and other Appellate Court relevant evidentiary requirements under law, verifying that Petitioner established a prima facie case under definition approved by higher court and or other appellate court judgements.

In short, the Fifth Circuit Court denied Petitioner his constitutional rights to a Fair and Impartial Hearing, a Fair and Impartial Review and Evaluation of Petitioner Evidence and Arguments, a Fair and Impartial Decision without prejudice where decision was suspiciously motivated by Petitioner non-attorney status, and Fifth Circuit Court decision was neither Fair or Impartial failing to conform with prior Supreme Court and Appellate Court decision(s) rendered in similar case judegments involving establishment of a prima facie case, where Petitioner pointed to affidavits, depositions or documents verifying employer pretext to discriminate, concluding that a favorable decision should have been awarded to non-attorney Petitioner.

In addition, Fifth Circuit Court decision failed to point to any credible Respondent evidence,

testimony, affidavit, deposition, or agency personnel documents in the record, which supported District Court decision.

REASONS FOR GRANTING PETITION

Petitioner is aware of the devastation experienced by the State of Louisiana by hurricane katrina. Is aware that the disaster impacted the certain backlog of appellate cases on appeal experienced by the Fifth Circuit Court of Appeals due to hurricane katrina, and is certain that in the rush by Fifth Circuit Court to minimize its overburdened backlog of appeals, prejudicially attempts to pass the burden of the pursuit of Justice to non-attorney victim of discriminatory business practices. Fifth Circuit Court decision ignored non-attorney Petitioner legal arguments and evidentiary facts provided in required FRAP Record Excerpts submitted to Appellate Court, and additionally ignored cited Supreme Court decisions defining an acceptable prima facie case.

Fifth Circuit Court departed from the accepted and usual course of judicial

proceedings refused to correct obvious error identified by non-attorney Petitioner in its decision, determined by Petitioner as attempt by Fifth Circuit Court to encourage non-attorney Petitioner to abandon pursuit of his appeal over more unlikely review of his appeal before the Supreme Court under a Writ of Certiorari.

Petitioner pray that the Supreme Court will grant Writ of Certiorari and determine Fifth Circuit Court actions as unconstitutional no matter the circumstance, natural disaster or inconveniences experienced by the state of Louisiana based upon the unexpected furies brought upon the state by mother nature. The Supreme Court cannot permit the Fifth Circuit Court of Appeals to discriminatively [I]gnore the law based upon and individuals national origin or non-attorney status compounding the number of victims devastated by katrina by punishing a disabled Vietnam veteran who prior to katrina experience physical, mental and later discriminatory loss of employment; [I]gnore the law based upon the unlawful actions of a predominately African American model employer (HUD Fair Housing & Equal Opportunity, Fort Worth, TX.) discriminatory

business practices against non-black-Hispanic Americans, without Appellate Court concern of the adverse impact its decision will have on past and historical case decisions, and future Supreme Court Title VII decisions concerning unlawful Federal employment discrimination. The Supreme Court cannot allow the Fifth Circuit Court to trade one victim for another, simply because the tragedies of katrina warrant an injustice against a hispanic non-attorney Petitioner who like katrina threaten the legal profession by lack of attainment of a juris-prudence degree.

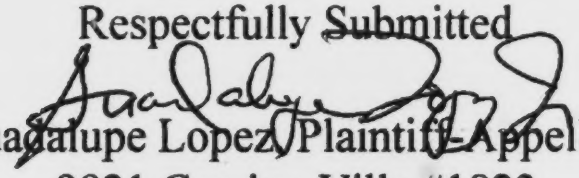
Supreme Court must determine Fifth Circuit Court decision prejudice where Appellate Court was infomed of obvious misinterpretations of facts in its decision which wrongly concluded that Petitioner did not establish a prima facie case of promotion, when appeal before the Fifth Circuit Court did not involve discrimination based on failure to promote. Supreme Court must determine Fifth Circuit Court decision to be unconstitutional and must be reversed and vacated, where decision can be determined prejudicial towards non- attorney Petitioner where intent by Fifth Circuit Court unfavorable decision was to

prevent a potential adverse impact on the legal profession if a favorable decision were to be rendered on an appeal advanced by a non-attorney. Petitioner pray that the Supreme Court will grant Petitioner Writ of Certiorari based on obvious constitutional violations in Appellate Court decision, and lack of Impartiality based on prejudice verified by Fifth Circuit Court one-sided view of the laws of evidence defining a prima facie case in contradiction with previous Supreme Court decisions. Petitioner also Pray that the Supreme Court will see through the Fifth Circuit Court of Appeals discriminatively and prejudicially cavalier judgement, denying Petitioner appellate case based on the definite odds in favor of the Fifth Circuit Court that Petitioner Writ of Certiorari will ultimately be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted



Guadalupe Lopez, Plaintiff-Appellant
9821 Camino Villa #1823
San Antonio, TX. 78254
(210) 682-2247

Date: November 23, 2007

N0._____

IN THE

SUPREME COURT OF THE UNITED STATES

GUADALUPE LOPEZ
PETITIONER

VS.

SECRETARY, DEPARTMENT OF HUD
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

INDEX OF APPENDICES

GUADALUPE F. LOPEZ
9821 CAMINO VILLA #1823
SAN ANTONIO, TX. 78254
210-682-2247 [HM. & FAX#]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-11300

GUADALUPE F. LOPEZ
Plaintiff - Appellant

v.

SECRETARY OF HOUSING AND URBAN DEVELOPMENT
Defendant - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before Jolly, Dennis, and Clement, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT: U.S Court of Appeals
"s/" FILED
AUG. 14. 2007
Charles R. Fulbruge III
Clerk

APPENDIX A

BEST AVAILABLE COPY

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11300
Summary Calendar

FILED
July 9, 2007
Clerk

GUADALUPE F. LOPEZ
Plaintiff-Appellant

versus

MEL MARTINEZ, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CV-1218

Before Jolly, Dennis, and Clement, Circuit Judges.

PER CURIAM:

The appellant Guadlupe Lopez appeals the district court's judgement as a matter of law pursuant to Fed. R. Civ. P. 50(b) (6) in favor of the appellees at the conclusion of the plaintiff's case. Since the appellant failed to provide the facts for a prima facie case for any of his claims at the close of his case-in-chief, we AFFIRM the district court's judgement.

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and its is not precedent except under the limited circumstances set forth in the 5th Cir. R. 47.5.4

Lopez, appearing pro se, filed several employment discrimination claims against the Department of Housing and Urban Development. He claims the Department failed to promote him, because of his age, his national origin, and as a result of retaliation. Lopez also claims he was subjected to a hostile working environment.

He alleges he was not selected for a permanent federal position, because he is Hispanic, though he was later selected to fill that position on a temporary basis. He also alleges he was terminated from that temporary position in retaliation for filing a EEOC complaint regarding his nonselection for the permanent position. At the close of the plaintiff's case-in-chief, the government moved to dismiss his case pursuant to Fed. R. Civ. P. 50(b)(6). After a hearing on the motion, the district court granted the government's motion for judgement as a matter of law on all claims, because Lopez failed to present facts constituting a prima facie case for any of his claims.

We review a grant of judgement as a matter of law pursuant to Rule 50(b) *de novo*, applying the same legal standard as the district court. Flowers v. S. Reg.l Physician Servs. Inc., 247 F.3d 229, 235 (5th Cir. 2001).

We agree with the district court that the appellant failed to provide sufficient evidence with regards to certain necessary elements of his prima facie case for all of his claims. A prima facie case is established once the plaintiff has proved that he (1)

is a member of a protected class; (2) was qualified for his position; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999).

For his claim of national origin discrimination in hiring, he has failed to prove that the positions were provided to members outside of his protected class. There was evidence that two qualified Hispanics, while not initially selected in a preliminary round, were eventually offered the positions.

For his claim of national origin discrimination in wrongful discharge, he has equally failed to show that he was replaced by someone outside of his protected class.

Lopez did not provide any evidence regarding his age discrimination claim and there was no evidence that he first exhausted administrative remedies in relation to this particular claim. *See Vielma v. Eureka Co.*, 218 F.3d 458, 462 (5th Cir. 2000).

For his hostile work environment claim, the evidence does not support a subjective perception of severe or pervasive harassment that an objectively reasonable person would find as hostile and abusive. *See Septimus v. Univ. of Houston*, 399 F.3d 601, 611 (5th Cir. 2005). The alleged incidents were isolated and were not "physically threatening or humiliating" and the conduct did not "unreasonably interfere[] with [his] work performance." *Id.*

Finally, for his retaliation claim, he failed to produce evidence that a "casual link existed between the protected activity and the adverse action." *Id.* at 610. As the district court noted, the evidence was inadequate to support such a link. He was terminated one year after he filed the complaint, and his temporary position was renewed four months after the complaint. Some evidence indicated that the supervisors who terminated Lopez were not aware of his complaint. Lopez presented no evidence establishing the supervisor's knowledge. *See Watts v. Kroger*, 170 F.3d 505, 512 (5th Cir. 1999).

Therefore, the district court's judment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE LOPEZ,

Plaintiff,

vs.

MEL MARTINEZ, Secretary, U.S. Department of Housing & Urban Development,

Defendant.

FILED
June 22, 2005
Clerk U.S. District Court

Civil Action No.
3:03-CV-1218-BF(R)

JUDGEMENT

This case came on for trial before the Court and jury. After Plaintiff fully presented his case in chief and rested, the Court rendered judgement as a matter of law pursuant to Fed. R. Civ. P. 50(a) for Plaintiff's failure to present facts constituting a prima facie case of race or national origin discrimination, age discrimination, a hostile working environment, or retaliation.

IT IS ORDERED and ADJUDGED that Plaintiff take nothing, that judgement is granted in favor of Defendant on the merits, and that each party shall bear its own cost.

Signed, June 22, 2005

"S"

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE LOPEZ

Plaintiff

v. No. 3:03-CV-1218-BF

MEL MARTINEZ, SECRETARY,
United States Department of Housing
& Urban Development,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS
MOTION FOR JUDGEMENT AS A MATTER OF LAW

Defendant Mel Martinez asks the court to render judgement in his favor, as authorized by Federal Rule of Civil Procedure 50(a), and in support of this Motion states as follows:

1. Federal Rule of Civil Procedure 50(a) authorizes the court to render judgement as a matter of law against a party who, after being fully heard on an issue, does not present facts constituting a *prima facie* case and does not meet its burden of proof. *See* Fed. R. Civ. P. 50(a)(1) *St Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S.Ct. 2742, 2748 (1993); *Delano-Pyle v. Victoria County*, 302 F.3d 567, 572 (5th Cir. 2002).

2. Plaintiff rested his case in chief and has been fully heard on all issues on which he has the burden of proof: his claims for discrimination on the basis of national origin, discrimination on the basis of his age, hostile working

environment, and unlawful retaliation. Pursuant to Rule 50(a), a judgement as a matter of law is now proper for Defendant Martinez on Plaintiff's four Title VII claims.

National Origin Discrimination-Hiring

3. Plaintiff asserts that he was not selected for several open positions with the Department of Housing & Urban Development because he was discriminated against on the basis of his Hispanic national origin. To sustain his claim, Plaintiff must prove that: (1) he was a member of a protected group; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, Plaintiff was rejected; and (4) someone outside the protected group was slected. *Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, 407-08 (5th Cir. 1999).

4. Plaintiff has failed to sustain his *prima facie* case on this claim because the evidence has shown that the hiring officials at HUD selected **two** Hispanic individuals for the permanent positions Plaintiff applied for. Because two individuals in Plaintiff's protected group were offered positions, there was no discrimination against Plaintiff on the basis of his national origin, and this claim must fail. *See, e.g., Evans v. Napa Auto Genuine Parts Co.*, 2001 WL 1338353, at *6 (N.D. Tex. Oct. 17, 2001) (summary judgement proper where four of six individuals receiving promotions sought by plaintiff were from his protected class); *Drake v. Magnolia Mgmt. Corp.*, 115 F. Supp.2d 712, 723 (E.D. La. 2000) (granting summary judgement where plaintiff could not satisfy fourth element of prima facie case of sex discrimination because she was replaced by a member of the same protected class); *Powers v. Dallas County Cmty. Coll. Dist.*, 1997 WL 446442, at *5 (N.D. Tex. July 16, 1997) (granting summary on discrimination claim where plaintiff could not "avoid the fact that her position was given to another individual within the protected class").

National Origin Discrimination-Termination

5. For his wrongful discharge claim on the basis of national origin, Plaintiff must prove that (1) plaintiff was in a protected class; (2) plaintiff was qualified for the position; (3) plaintiff was discharged; and (4) was replaced by a person who is not a member of that protected class. *Frank v. Xerox Corp.*, 347 F.3d 130, 137 (5th Cir. 2005). As an alternative to the fourth requirement, the plaintiff may show that other similarly situated employees were treated more favorably. *Bryan v. McKinsey & Co., Inc.*, 375 F.3d 358, 360 (5th Cir. 2004).

6. Defendant is entitled to judgement as a matter of law on this claim because Plaintiff has not introduced legally sufficient evidence to submit the issue to the jury. He has offered no evidence that he was replaced by a person who is not a member of his protected class, or that similarly-situated employees were treated more favorably. *See Christian v. City of Dallas*, 64 F.Supp. 2d 617, 626 (N.D. Tex. 1999) (granting summary judgement on plaintiff's wrongful termination claim where plaintiff "failed to offer any evidence of being replaced by a person outside of his protected class"). Accordingly, Plaintiff has not established a *prima facie* case of national origin discrimination in his termination from the Department of Housing & Urban Development.

Age Discrimination-Hiring and Termination

7. Defendant also is entitled to judgement as a matter of law as to Plaintiff's age discrimination claim. Plaintiff presented no evidence whatsoever that he was discriminated against by Defendant on the basis of his age. In fact, Plaintiff did not even mention his age discrimination claim during his case-in-chief. Thus, Plaintiff has failed to offer any evidence on the *prima facie* case for age discrimination, and this claim should be dismissed.

8. In addition, there is no evidence that Plaintiff exhausted his administrative remedies on his age discrimination claim. This claim was raised for the first time in this federal court proceeding, which is impermissible. *See Brookins v. Potter*, 2005 WL 1422126, at *2 (N.D. Tex. June 16, 2005) (Stickney, Magis.J.) ("[B]efore bringing suit, an employer must exhaust his administrative remedies against his federal employer," citing *Fitzgerald v. Secretary, U.S. Dept. of Veterans Affairs*, 121 F.3d 203, 206 (5th Cir. 1997)).

Hostile Work Environment

9. To prevail on a hostile work environment claim, Plaintiff must prove that (1) he belonged to a protected group; (2) he was subject to unwelcome harassment; (3) the harassment complained of was based on race; and (4) the harassment affected a term, condition or privilege of employment. *Frank*, 347 F.3d at 138. A plaintiff must subjectively perceive the harassment as sufficiently severe or pervasive, and this subjective perception must be objectively reasonable. *Id.* Factors to be considered include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *Id.*

10. Judgement as a matter of law is also proper as to Plaintiff's hostile work environment claim. The alleged harassment, just several incidents spread out over the course of Plaintiff's year and a half period of employment, did not affect a term, condition, or privilege of Plaintiff's employment because the alleged harassment was not sufficiently severe or pervasive. Plaintiff testified about various incidents - such as being questioned about a parked HUD car and his extended lunch breaks - but he was not disciplined for any of these incidents, and there is simply no indication that Plaintiff's race had anything to do with these situations. These incidents were infrequent, not severe,

not physically threatening or humiliating, and did not unreasonably interfere with his work performance. Plaintiff has failed to establish his *prima facie* case on this claim.

Retaliation-Termination

11. For his claim of retaliation to succeed, Plaintiff must prove that: (1) he engaged in protected activity; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse action. *Septimus v. Univ. of Houston*, 299 F.3d 601, (5th Cir. 2005). To satisfy the third element of his *prima facie* case, the temporal proximity between the protected activity and the adverse action must be "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001).

12. Plaintiff's retaliation claim fails for three reasons. First, approximately one year passed between his EEO complaint on September 28, 1993, and his termination on September 9, 1994. This is not required "close" temporal relation betwen Plaintiff's protected activity and his termination. *See, e.g., Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (7th Cir. 1992) (4-month period insufficient).

13. Second, the causal link element of Plaintiff's *prima facie* case also fails because Plaintiff had his temporary appointment renewed on January 16, 1994, for the remainder of that fiscal year, or until September 30, 1994. This renewal took place four months ***after*** his EEO complaint, and indicates that there was no causal link between the EEO complaint and his termination because Plaintiff's supervisors did not hesitate to renew his temporary appointment just months after his EEO activity. Given this fact, Plaintiff cannot reasonably argue that his protected activity somehow spurred his superiors to terminate him one year later.

14. Finally, Plaintiff offered no evidence during his case-in-chief that his supervisors had knowledge of his EEO activity. This is a fatal defect in Plaintiff's retaliation claim, and thus judgement as a matter of law for Defendant is therefore proper. *See Watts v. Kroger Co.*, 170 F.3d 505, 512 (5th Cir. 1999) (business could not, as a matter of law, retaliate against employee if it had no knowledge of her protected activity).

15.. In sum, the Court should grant judgement in favor of Defendant Martinez as a matter of law. There is no legally sufficient basis for the jury to find for Plaintiff because there is a complete absence of pleading or proof on an issue material to the cause of action. *Singer v. Dungan*, 45 F.3d 823, 827 (4th Cir.1995).

Respectfully summitted,

RICHARD B. ROPER
United States Attorney

T.J. JOHNSON
Assistant United States Attorney
1100 Commerce St., 3rd Floor
Dallas, TX. 75242-1699

STEPHEN P. FAHEY
Assistant United States Attorney
1100 Commerce St., 3rd Floor
Dallas, TX. 75242-1699

CERTIFICATE OF SERVICE

I certify that on the 22nd day of June, 2005, a copy of the forgoing motion was hand-delivered to pro-se plaintiff Guadalupe Lopez.

US Department Of Housing & Urban Development

Vacany Number 06-MSR-91-0049z

Non-Competitive Selection Roster

Position: Opportunity Specialist, GS-0360-11 Prom to GS-12 of FHEO, Fair Housing Enforcement Division, Title VIII System Branch Fort Worth, Texas

Date Referred/Date Received 6-24-91 7-19-91

Date: 6-19-91 Personnel Representative: Clardel Walker

Qualified Candidates Eligible For Lateral Reassignment, Lateral Transfer, Reinstatement To The Full Performance Level, And/Or Eligible For Special Placement.
(HUD-AFGE Agreement, Section 13.05)

Name	Interview Yes-No	Remarks	Action Taken
1. Richard Arispe	X		N/S
2. Rose J. Cherrier	X		N/S
3. Rolando Garcia	X		N/S
4. Guadalupe Lopez	X		N/S
5. Pedro T. Vaca	X		N/S

[ ] By my signature below, I certify that I have not unlawfully discriminated in selecting the Best Qualified candidate indicated by the "S" in Action Taken.
[X] Other. Selection made from DEU Certificate

Date 7 19 91 Signature of Selecting Official John Eubanks

APPENDIX D

CERTIFICATE OF ELIGIBLES

Fort Worth Regional Office
Certificate Number: RB-06-3-0001S0
Issued On January 26, 1993

Type Of Appointment:	Temporary
Occupation:	Equal Oportunity Specialist
Pay-Series-Grade:	GS-0360-11
Location:	Fort Worth, Tx.

Agency Action	Rating Vet.	
SA EOD: 2-16-93	TP	Alonzo Hardy
SA EOD: 2-25-93	TP	Larry Young
SA EOD: 3-1-93	NV	Bonita H. Edmondson
DP	NV	Michael D. Ivey
DP	NV	Jean A. Moulder

APPENDIX E

From: Clardel C. Walker 2.4 93 5:10PM
To: Juanita Gregory, Tom Peeler, Jim Garcia
Receipt Requested
cc: John E. Wright, John E. Eubanks
DEU Applicant-Declination

----------Message Contents----------

Michael D. Ivey called today to inform me that he does not want to be considered for the temporary position of EO Specialist in FHEO because he currently is employed in a permanent position.

I contacted Guadalupe Lopez (Displaced Employee Applicant) Today. He is no longer living in Albuquerque but has moved to Texas. He spends time in Garland with his parents but is presently in San Antonio. He is interested in the Temporary position and said travel would not be a problem. John Eubanks set up an Interview with him for next week. Mr. Lopez's last Federal Job was a GS-11/05 EO Specialist with Dept. of Labor.

AFFIDAVIT

I, John Eubanks, Director, Fair Housing Enforcement, Department of Housing and Urban Development: Region VI, GM-14, being first duly sworn on oath make the following statement freely and voluntarily to Ms. June Love who has identified herself to me as an EEO Investigator, Southwind Enterprises Inc., assigned by the Housing and Urban Development (HUD) to perform this investigation knowing that this statement may be used in evidence. I understand that this statement is not confidential and may be shown to any party who has an official interest.

This statement is given in relation to the complaint of discrimination filed by Guadalupe Lopez.

My full name is John E. Eubanks. My Title is that of Director, Fair Housing Enforcement, GM-14. I am the Director for the Fair Housing Enforcement Division; Region VI; DHUD; 1600 Throckmorton; Ft. Worth, Texas. I have held this position for 4 years and have been a federal employee since 1969. My immediate supervisor is John Wright, Director Fair Housing, and my second level supervisor is F. Davis, Acting Regional Administrator/Fair Housing Commissioner.

I an Black and decline to respond to the question related to handicap. Mr. Lopez's name did not come before me at any time that I am aware of. He was never referred to me for recommendation for selection. I don't know whether any handicapped individuals were selected for any positions, there may have been for the eighteen month period for which inquiry is made, 6/91-12/92. That information may be available through the personnel office.

I don't know whether any Hispanics were selected for any positions there may have been for the eighteen month

period, 6 91-12 92. Those records, too, may be in personnel. I did select Sheila Qualls. She was selected from the Outstanding Scholar Program. I discussed this selection with my immediate supervisor. Mr. Lopez's name did not appear on the Outstanding Scholar certificate. I did not interview or talk with Mr. Lopez at any time.

I can not compare the qualification of the candidates; that is determined by the personnel office. They send us the final group of individuals that are highly qualified or the certificate from which a selection is made. I do not compare qualifications of candidates, per se. Ms Qualls was selected at the entry level GS-7. Mr. Lopez is and was a GS-11. There is a great difference in their qualifications based on the grade level.

I did select Mr. Rayford Johnson. He was selected from the Delegated Examining Authority obtained through the Office of Personnel Management (OPM). Again, this selection was discussed with my supervisor; however. Mr. Lopez's name did not surface. He was not on the Delegated Examining certificate used to fill this position. He would have had to apply to be considered for this certificate. His name was referred, I believe, as a non-competitive candidate. However, the selection was not made from the vacancy announcement (internal placement), but rather from the Examining Authority.

There was no comparison of Mr. Lopez's qualifications with anyone at the time of the selection. I can not compare his qualifications at this time either.

Mr Gary Lacefield was also selected by me. Mr Lacefield was selected from the Outstanding Scholar Program. Again, Mr. Lopez was not on the Outstanding Scholar Program and was not considered. He may have been referred on the regular merit promotion vacancy as a non-competitive applicant. I do not recall. I have never been advised that Mr. Lopez had

to be selected for any position. I did not see his name on any of the requisite certificates from which selections were made. Since Mr. Lopez was not on any of the certificates that were used to make selection. I fail to see how he was discriminated against for any reason. I recently selected Mr. Lopez for a temporary position. I was advised by personnel that Mr. Lopez was a displaced employee and they had been advised by OPM that I could not fill any of the temporary positions I had with anyone except Mr. Lopez. We spent a long time trying to locate Mr. Lopez. It was very difficult to find him. I believe the specialist (no longer with the agency) found him either in Garland or San Antonio, Texas. I don't know why it took so long to find him. We fell behind weeks because of his claim that he was a displaced employee and OPM apparently told personnel we had to hire him in the displace employee program. I did not understand the personnel aspects of this claim and have not received any proof that he is a displaced employee, in accordance with the applicable regulations. Right now he is working as a temporary employee.

I know nothing of his claim of discrimination. No one has discriminated against him. He was never on any certificates that were used to make a selection from and was therefore not considered in those specific circumstances. Since we did not look at the regular certificates of candidates; I fail to see how he could have been discriminated against. He was not on the list used for the selections.

I have read this statement consisting of 4 pages, and I have made all necessary changes, additions, or corrections, and I have signed or initialed every page. I hereby declare under penalty of perjury that the foregoing statement is true, correct, and complete to the best of my knowledge and belief.
Signature of Affiant: John F. Eubanks

AFFIDAVIT

I, Juanita Gregory (no handicap), being first duly sworn on oath make the following statement freely and voluntarily to Ms. June Love who has identified herself to me as an EEO Investigator, Southwind Enterprises Inc., assigned by the Housing and Urban Development (HUD) to perform this investigation knowing that this statement may be used in evidence. I understand that this statement is not confidential and may be shown to any party who has an official interest.

This statement is given in relation to the complaint of discrimination filed by Guadalupe Lopez.

My full name is Juanita M. Gregory (English-Scotish-Irish, Cherokee, American). My Titl is Supervisory Personnel Management Specialist, GM-0201-13. I am the supervisor for the Classification and Staffing Branch, Regional Personnel Division, U.S. Department of Housing and Urban Development (HUD), 1600 Throckmorton Street, Fort Worth, Texas.

I have held this position for about eight years. I have been employed by the Federal Government for 38 years. My immediate supervisor is James G. Garcia, Jr., Regional Personnel Officer, and my second level supervisor is Tom Peeler, Director, Office of Administration.

Mr. Lopez, the complainant in this case, applied for an Equal Opportunity Specialist, GS-11, position under internal Vacancy Announcement Number 06-MSR-91-0049z. This announcement includes status candidates, certain veterans, etc. As a 30% disabled veteran, Mr. Lopez was referred on a non-competitive roster to the selecting official but was not selected.

I hereby declare under penalty of perjury that the foregoing statement is true, correct, and complete to the best of my knowledge and belief. Signature of Affiant: Juanita Gregory

SUMMARY OF COUNSELOR'S INQUIRY

1. Personal Contacts Garry Sweeney October 6.1994

Include the name, title, relationship to the AP's allegations, and the date of contact of each person contacted. Provide a summary of the information obtained.

How would you rate Mr. Lopez as an employee? As an Investigator? "More than fully successful on the job. The only problem with him was that he questioned authority all the time." How would you describe his conduct on the job? "I received complaints on h approach. Also had telephone calls with questions on things we didn't even have a case on. If we had ao case in inventory, we should not work it." If his conduct was bad, how many times did you counsel him regarding it? "One formal, dealing with Martha Moreno, the others were just verbal at the time of his questioning." How many times is a person normally counseled before other disciplinary measures are taken? Would depend on situation. Temps are treated differently since they are not on permanent, we would not spend as much time on them."

SUMMARY OF INFORMAL RESOLUTION ATTEMPT:

As stated above, Mr. Sweeney indicates he was not willing to do anything to reinstate Mr. Lopez.

APPENDIX G

MEMO

To: Garry Sweeney, Title VIII West Branch Chief, 6EEEW

From: Guadalupe Lopez, Title VIII EOS 12.28.93

According to your memo concerning the circumstances in the Moreno v. Manchester Apartments and Hunt Club Apartments, the following rebuttal is submitted.

Previous false observations by you in the past about excessive lunch periods alleged aganist myself and Ms. Moreno and now your pre-textual allegations of conflict of interest and administrative confidentiality again directed at myself and Ms Moreno, support the fact that you have a problem or dislike towards working along side hispanics. This action is also supported by Ms. Cherrier and other Hispanic colleagues.

Your memo to me concerning your alleged determination of my actions is unsupported based on the following circumstances:

1) Your indirect allegation that I shared my Intake notes with the complainant, is a total misrepresentation of the truth an insult to the complainants knowledge of her own housing problem.

2) If my notes were attached to the HUD 903 complaint form which was forwarded to you by Mr. Redman, why did you not ask him why my notes were stapled to the 903 and not entered separately. In the past I have entered notes with other 903 complaints without incident, why are the situations any different here.

APPENDIX G

MEMO

August 17, 1994

Memorandum For: Garry Sweeney, Chief, Title VIII
Branch-West, 6EEEW
From: Guadalupe Lopez, Equal Opportunity Specialist,
6EEEW

Subject: Fair Housing Complaint Conciliation(s)

In order to insure that performance standards, ratings and position objectives required of 360 series Equal Opportunity Specialist job title is non-discriminatively evaluated, the following is requested.

1. Copy of Final Headquarters ruling on EOS of record not suitable for role of conciliator.

2. Copy of Headquarters guidelines or instructions explaining the method to be used in assigning EOS's as conciliators.

3. Copy of the Southwest Area approved method of assignment of concilitory functions by EOS's other than investigator of record.

4. Copy of Union approval on revised Performance Standards for conciliatory case accomplishments.

If final ruling has not been reached and conciliatory duties are removed without proper authority, I will seek Headquarters guidance concerning what measures must be taken to reach a non-discriminatory alignment of Performace Standards when conciliatory functions are removed.

APPENDIX G

MEMO

September 5, 1994

Memorandum For: John E. Wright, Director, Southwest Office of Fair Housing and Equal Opportunity, 6E

From: Garry L. Sweeney, Chief, Fair Housing Enforcement Division, West Branch, 6EEEW

SUBJECT: Recommended Termination of the Temporary Appointment Held By Guadalupe Lopez.

During Mr. Lopez employment with this agency he has been involved in several questionable situations which in my estimation warrant the termination of his appointment. These situations are summarized below:

Ballinger Housing Authority:

On Wednesday, August 31, 1994, I met with Acting Director of Public Housing Joe Brinkley, regarding a matter which had been addressed to him regarding alleged inappropriate behavior by Guadalupe Lopez. According to Brinkley, Lopez had called Public Housing on August 24, 1994 regarding the regulations pertaining to the admission of persons with past criminal histories into public housing. Lopez stated that he had received an EO complaint from someone against the Ballinger, Tx. H.A. alleging that they were not being admitted because the husband was under indictment. Lopez stated that the HA had told him that they had been told by Norm Lee of Public Housing that they did not have to admit the applicant because of the indictment. Brinkley stated that he told Lopez that he would provide the applicable regulations to him. Brinkley stated that these parties had informed him that the ED of the H.A. Dorthy Wadsworth

APPENDIX H

(915-365-2629) had told them that Lopez had called her and had yelled at her, accusing her of discrimination against the applicants. They stated that Wadsworth was so appalled by Lopez's unexpected and disrespectful behavior that she was tendering her resignation.

Wadsworth stated that she received the call from Lopez on August 24, 1994. She said Lopez began yelling at her and accusing her of discrimination against Mr. and Mrs. Vasquez. (Mr. Vasquez is Hispanic, his wife is White).

To date, there has been no complaint filed by the Vasquez family against the Balliger H.A. I had counseled Lopez on earlier occasions regarding the negotiation of complaints without first accepting a complaint.

Ray J. Armenta Situarion:

On September 1, 1994, Assistant Associate General Counsel John Bowlin brought a matter to my attention regarding Mr. Lopez's request for information regarding annexation procedures in the State of New Mexico. Bolin stated that Lopez had summarized a situation to him which resembled one which was investigated and dismissed by this Department for No Cause. When he brought this to Lopez's attention, Lopez became flustered and stated that he just wanted to see if the matter was handled appropriately. Bolen stated that he told Lopez that it was not appropriate for anyone from this Department to counsel with complainants following the dismissal of a case since it could compromise the Agency. Bolen stated that this was particularly true in this situation since the Complainant was apparently not happy with the deposition of the case and had requested the case file under FOIA. Bolen stated that he gave the information to Lopez and Lopez reviewed it in the library. (Subject Case File is 06-94-0290-8, Ray Armenta v. Wilderness Gate HOA, closed 5-23-94, NC, Whitfield was the assigned investigator)

Emilio Barrera-Texas Commission on Human Rights Situation

On August 16, 1994, Lopez provided me with a copy of an undated letter from Emilio Barrera and David Aleman, Sr. to Stephen R. Weatherford. The letter complained about the lack of attention being afforded to their case (06-94-0958- 8) by the Texas Commission on Human Rights (TCHR). The original of the letter was received in FHEO on August 16, 1994 apparently after the copy Lopez was provided. This leads me to believe that he had requested the document at an earlier date. Lopez stated that the complainants were under eviction and that the TCHR was doing nothing to stop it. Lopez stated that he was tired of the way TCHR was conducting business and that he was going to report them to OIG. I apprised him that it was not within his area of responsibility to assess the performance of TCHR and that I would contact the agency to discuss the necessity to halt the eviction if such was warranted.

On September 1, 1994, I received a call from Lex Liberatore. Liberatore stated that Barrera and Aleman were still under eviction and that a September 14, 1994 eviction date was set. He stated that he was trying to find an attorney to get their own injunctive relief. He elaborated upon his frustration with TCHR and commented as to how the Office of Inspector General is looking into TCHR's operations. I asked him to explain his comments and all he would say was that a reliable source had told him that HUD's OIG was looking into it. He would not identify the source. I have to wonder whether or not Lopez had either spoken to Liberatore or if he had told someone else, such as Barrera, what he had told me earlier. Lopez's involvements in this situation and his apparent vendetta against the TCHR is something which cannot be tolerated by an employee of the Department. His attitudes and actions could greatly compromise the Departments relationship with both the TCHR and the Austin Tenant's Coneil.

FHEO Secretary Martha Moreno's Complaint Situation:

On December 16, 1993, I found two HUD Form 903s which were filed by Branch secretary Martha Moreno, in my box. In reviewing the complaints they referenced attachments which contained notes summarizing conversations Guadalupe Lopez had with named Respondents some two weeks earlier. In reviewing the complaints it appeared as though Moreno had formulated the allegations around what Lopez had discovered during these earlier inquiries. On December 22, 1993 I spoke with both Lopez and Moreno regarding the complaints and the potential conflict of interest I saw. I informed Moreno that it would be inappropriate to file complaints based upon information she was not privy to on her own. I formulated two new complaints based upon the interview with Moreno. I formally apprised Lopez of my concerns by memorandum dated December 22, 1993. On December 28, 1993 Lopez responded to my memorandum alleging that I had launched false allegations at himecause I disliked Hispanics. In his memorandum he stated that he did not share any of his notes with Moreno and that the notes must have been stapled to the Form 903 by Intake Analyst Redmon.

Summary:

It appears evident that Guadalupe Lopez has exhibited behavior which is not conductive to the highly sensitive and confidential position he occupies. His actions have placed this Department in jeopardy by compromising its relationship with its constituent agencies and with the clients it is sworn to assist in a non-bias manner. It is therefore my recommendation that his temporary appointment be terminated as early as possible.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
June 21.2005
Clerk.US District Court

GUADALUPE LOPEZ.
Plaintiff.

v. NO. 3:03-CV-1218-BF

MEL MARTINEZ, Secretary
U.S. Department of Housing
and Urban Development.
Defendant.

JOINT PRETRIAL ORDER

Page 2 thru 6, Defendant's Defense

a. Defendant states that all actions taken by Mr. Wright, Mr.Eubanks and Mr.Sweeney, or any other HUD managers, affecting plaintiff or his employment were taken for legitimate business purposes and were proper and normal exercises of business judgment. Accordingly, defendant submits that plaintiff cannot meet his required burden of proof to prevail in a Title VII discrimination and reprisal case and therefore his claims must be dismissed.

(b) Statement of Stipulated Facts

*Plaintiff. Guadalupe Lopez was a Equal Opportunity Specialist (EOS) supervised by Garry Sweeney from February 1993 to September 1994.

*John Eubanks requested merit staffing for 3 new

APPENDIX I

permanent Equal Opportunity Specialist positions in Fort Worth at GS-11 level, which resulted in an internal vacancy announcement 06-MSR-91-0049z

*On or about 3 18 91, plaintiff (LOPEZ), forwarded to HUD personnel application for federal employment. SF-171 for advertised EOS position(s).

*Lopez was qualified for the EOS positions and held the grade, at the time of selection of GS-11

*On 4/24/91 an external Delegated examining Unit Announcement (DEU)(Recuriting Bullitin) RB-06-1-0022 was also issued for the 3 permanent EOS positions in Fort Worth Texas.

*The 3 permanent EOS positions for Fort Worth were reannounced on 5/17/91 as RB-06-0028.

*Walker gave John Eubanks at least 1 list of potential candidates: noncompetitive, status employees from the Internal Vacancy Announcement 06-MSR-91-0049z.

*Eubanks selected Rayford L. Johnson, African American.

*Defendant Form HUD-154 dated June 19,1991 titled Noncompetitive Selection Roster for Vacancy number 06-MSR-91-0049z Qualified Candidates, referred by name plaintiff and four other Hispanic candidates as qualified to selecting official.

*Defendant Form HUD-154 dated June 19,1991 titled Noncompetitive Selection Roster for Vacancy number 06-MSR-91-0049z Qualified Candidates, was referred to African American selecting official on

June 24. 1991 and was returned on July 19.1991 stating under "Action Taken" NS or that neither of the five qualified Hispanic candidates were selected.

*Vacancy announcement 06-MSR-91-0049z showed that closing date was 5.29.91

*On or abouts 2.4.93. personnel contacted plaintiff and offered the temporary EOS position, which he accepted.

*Plaintiff filed EEO Complaint #93-28, subject: nonselection for vancany announcement 06-MSR-91-0049z.

*In July of 1993, Eubanks questioned Lopez as to where he had parked a government car.

*In July of 1993, Eubanks questioned Lopez about a travel voucher and questioned plaintiff about his whereabouts and why he was not at his workstation.

*On 7/21/93, plaintiff filed EEO complaint #93-35, subject: Eubanks monitoring of office movements, requesting acting supervisor to as to return to desk; accusing of parking lease vehicle in wrong area; and accusing of attempting to defraud the government on travel voucher.

*On or abouts 9/2.93 Garry Sweeney accused Lopez of abuse of lunch hour and absence in the workplace and writes a memo to Lopez.

*On 9.28.93. Lopez filed EEO complaint #93-48, subject: extended lunch memo.

*On or abouts 9 9 94. Lopez was issued a notice of termination for conduct unbecoming of an EOS.

*10 19 94 Lopez filed EEO complaint #95-05

(c) Contested Issues of Fact:

*Whether Eubanks selected Ruben A. Jaquez, a Hispanic male.

*Whether Eubanks also selected Rose Cherrier, a Hispanic female, for the EOS position from Internal Vacancy Announcement 06-MSR-91-0049z

*Whether on or abouts 5/24/91 Gary Lacefield applied for any position available under the Outstanding Scholar Program.

*Whether on or abouts 8/2/91 Sheila Qualls applied for a position under the Outstanding Scholar Program

*Whether Defendant on or abouts 7/25/91 notified plaintiff in HUD Application Acknowledgment Form HUD-88 that African American Rayford Johnson was found to be better qualified than plaintiff for GS-0360-11 Equal Opportunity Specialist position advertised under vacancy announcement 06-MSR-91-0049z.

*Whether Defendant Screening Worksheet for Merit Staffing Action Form HUD-153 dated June 18, 1991 identify african american Rayford Johnson by name as a candidate who applied for defendnat vacancy announcement 06-MSR-91-0049z, did it identify

Rayford Johnson as qualified for EOS position. listed name of Rayford Johnson on referral list forwarded to african american selecting official on June 19,1991.

RICHARD B. ROPER
United States Attorney

T.J. JOHNSON
Assistant United States Attorney
1100 Commerce St., 3rd Floor
Dallas, TX. 75242-1699

Guadalupe Lopez
Plaintiff Pro-se
9821 Camino Villa #1823
San Antonio, TX. 78254

ENTERED this 21 day of June, 2005

Paul Stickney
United States Magistrate Judge

AFFIDAVIT

STATE OF TEXAS

COUNTY OF TARRANT

I. Garry Lee Sweeney. Caucasian Male with Scotch-Irish heritage. in the position of Supervisory Equal Opportunity Specialist. Southwest Office of Fair Housing ans Equal Opportunity, Fort Worth, Texas, make the following statement freely and voluntarily to June Love, who has identified herself to me as an EEO Contract Investigator for the U.S. Department of Housing and Urban Development, investigating a complaint of discrimination filed by Guadalupe Lopez, knowing that this statement may be used in evidence. I understand that this statement is not confidential and may be shown to the interested parties (those with a legal right to know). I hereby solemnly swear:

I have been assigned to my current position since 1988. I was the immediate supervisor of the Complainant during his tenure with the Department.

The incident which precipitated the filling of the subject EEO complaint occurred eighteen months ago. I will attempt to respone as accurately as I can despite the lengthy delay in processing the complaint.

On September 2. 1993, I observed that the Complainant was not at his workstation between the time of 11:30 a.m. and 1:15 p.m. when I left for lunch. The Complainant routinely left for lunch at 11:30 a.m. He often had lunch with co-worker Martha Moreno. Ms.Moreno was not at her workstation during this period either. I had observed that both Mr. Lopez and Ms. Moreno had exceeded the customary time governing lunch periods the previous few days. In order to

curtail what I thought was developing into a pattern of abuse. I felt compelled to put them on notice that they would have to take annual leave for the period of time exceeding the 30 minute lunch period authorized by the UNION CONTRACT. (Note: The Union Contract provides for a Lunch period of 30 minutes however, within the Fort Worth Office, there is an unwritten policy which basically allows employees to take up to one hour. The unwritten policy does not guarantee one hour and there is no provision for a pupervisor to authorize more than the 30 minutes which an employee works in excess of their paid tour of duty. Supervisors generally just "look the other way" as long as employees stay within the one hour period".

I provided both the Complainant and Ms. Moreno a memorandum requesting that they provide me with a leave slip for the period of time exceeding the 30 minutes I was authorized to recognize for lunch. (Note: The memorandum stated that I had observed them leaving for lunch at 11:30 a.m.. This was not the message I wanted to convey. What I meant to say was that I had observed that they had left for lunch.)

Neither party provided leave slips. Instead, they contacted EEO Counselor Barbara Bates. I had a discussion with Ms. Bates and she relayed to me that the Complainant and Ms. Moreno had told her that they did not leave for lunch until sometime around 12:00 p.m. when Ms. Moreno completed her time and attendance report and provided it to another timekeeper for transfer to the Time and Attendance Clerk.

This timekeeper, Belinda Childress, reportedly had signed in the reports at around 12:03 p.m. I informed Ms. Bates that I could not locate either party and that they have yet to tell me where they were since they were not at their workstations. If they were somewhere in the workplace then I could easily verify that. I know that they were not at their workstations because I sit adjacent to Ms. Moreno and I had to answer her

telephone during the period she was absent and I went to find the Complainant to relay a telephone message to him and he was not at his desk.

I never accused the Complainant of defrauding the Government. I simply gave him a memorandum requesting that he take annual leave for a period of time during which he was unjustifiably away from his workstation. In fact, I never charged either Ms. Moreno or the Complainant for the subject one hour and fifteen minutes because I felt that both parties had received the message I was trying to relay to them, that being that they should comply with the recognized lunch period. I was surprised when two weeks ago the Contract EEO Investigator told me she was investigating the subject situation. I had not been previously informed of the formal filing of a complaint.

My actions were not taken because of the Complainant's National Origin. They were taken based upon observations I had made. I have never had to take similar actions regarding other employees because I have not observed patterns which I considered to be abusive of the lunch period. I do not see how the Complainant was aggrieved since I initiated no disciplinary action against him and I did not charge him for the leave in question.

I have read the above statement consisting of 3 pages and it is true and complete to the best of my knowledge and belief. I understand that the information I have given is not to be considered confidential and that it may be shown to the interested parties.

Garry Sweeney
(Affiant Signature)